APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1966 — APRIL SESSION, 1967

No. 15870, 15871, 15872, 15873
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES E. BUCKLEY, ROBERT D. WALKER, HUGH NORWOOD, JR., and WESLEY K. GREEN,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

June 13, 1967

Before HASTINGS, *Chief Judge*, KNOCH, *Circuit Judge*, and MAJOR, *Senior Circuit Judge*.

KNOCH, *Circuit Judge*. The defendants-appellants, James E. Buckley, Robert D. Walker, and Hugh Norwood, Jr. were convicted after trial by jury of the theft of television sets moving in interstate commerce in violation of Title 18, U.S. Code §659. The defendant-appellant,

Wesley K. Green, was convicted of possession of stolen chattels taken from interstate commerce in violation of the same statute.

The Trial Judge imposed sentences of one year on each of the first three defendants above listed and three years on Mr. Green.

All four defendants contend that they were entrapped into taking and possessing the chattels in question and that, consequently, the items cannot be said to have been stolen.

At the trial, Federal Bureau of Investigation Special Agent, Russell R. Girsch, testified that on a visit to the defendants' employer, Associated Truck Lines, Inc., on December 7 or December 8, 1965, he conferred with Terminal Manager, Steven Generis, who advised him that Associated Truck had suffered a number of thefts and that the four defendants (among others) were viewed as suspects. Agent Girsch testified that he arranged to conduct a surveillance.

Milton Smazik, Associated Truck's safety and personnel supervisor, testified that on December 9, 1965, about noon, he saw three cartons of television sets, four cartons of Ampex recorders and a carton of spark plugs in a trailer which was parked in the fifth row from the west side, among the six rows of trailers parked in the yard of Associated Truck's premises. The record does not disclose who placed these items in that trailer.

Another F.B.I. Agent, James A. Roberts, testified that with Agent Girsch and Mr. Smazik, he conducted surveillance on December 9, 1965, from a truck parked in Associated Truck's parking lot, beginning at about 9:30 p.m.

George Reinhofer, who was employed by Associated Truck as a spotter and dock hand, testified that he telephoned defendant James Buckley about 7 or 8 p.m., on December 9, 1965, and told him "that there was some freight on a trailer," although he did not at that time know the character of the "freight." He stated that Mr. Buckley answered that he would look at it and take care of it.

None of the four defendants had duties which required him to handle or move freight.

Agent Roberts testified that about 10:20 p.m. he saw defendants Buckley and Walker engaged in a conversation, after which defendant Buckley moved a Pontiac automobile, then drove away in a panel truck and returned shortly. Agent Roberts then saw defendants Walker and Buckley transfer a carton from the panel truck to the Pontiac, which defendant Buckley then moved away. He saw defendant Buckley bring another automobile (license number 945-500) to the same location where the two defendants transferred to the automobile a carton brought by a yellow truck, after which the second automobile was moved to another spot, where the two defendants proceeded to change its oil. Agent Roberts then observed defendant Norwood drive up in a red truck from which two cartons were transferred to a Pontiac convertible. Still later he saw defendant Norwood drive up in a 1966 Mercury automobile license number 5D 5647*, into which defendant Norwood placed two cartons and then moved the automobile away. Some time later he saw defendant Norwood drive up a fifth automobile and put two more cartons into it from the truck.

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* That was defendant Green's automobile.

Mr. Reinhofer testified that when he arrived for work that night about 11 p.m. he met Mr. Buckley with whom he had a conversation; that Mr. Buckley told him what was in the parked trailer and said that "he already had one."

About midnight, Mr. Reinhofer had another conversation with Mr. Buckley and Mr. Norwood during which Mr. Buckley repeated that he had a television set in his car and asked Mr. Reinhofer what he wanted. Hugh Norwood asked Mr. Reinhofer for the keys to Mr. Reinhofer's automobile, which were given to him. Later Mr. Reinhofer heard Mr. Norwood ask Wesley Green if he wanted anything from the trailer and Mr. Green had said "yes." About 2:30 or 3:00 a.m., Mr. Norwood had returned Mr. Reinhofer's keys.

Meanwhile, about 12:30 a.m. Hugh Norwood had asked Mr. Reinhofer to move the trailer to a more convenient spot because he "didn't want anybody to see him" and Mr. Reinhofer had done so. Mr. Reinhofer testified that this was the only time he personally visited the trailer.

Each of the defendants was arrested after he had left the premises of Associated Truck and was driving home. The stolen items were found in the trunks of the various automobiles driven by the defendants.

Special Agent Swiercz testified that when Mr. Green's automobile trunk was opened, Mr. Green volunteered the statement that he had purchased the two cartons from someone at the terminal knowing they were stolen, and later he said that he agreed to buy a stolen radio and spark plugs from Mr. Norwood, turning his car keys over to the latter so that these items could be placed in

his automobile; that about 2:30 a.m. defendant Norwood had returned his keys with the statement that a radio and spark plugs were in the Green car trunk.

The four defendants testified to a series of approaches allegedly made to them individually by George Reinhofer in which he repeatedly urged them, despite their firm refusals to participate in thefts from Associated Truck, particularly urging three of them to take away the very items involved in this case because if they did not get rid of these items, another dock employee would be in trouble.

In his rebuttal testimony, George Reinhofer himself specifically denied any such approaches, asserting that the conversations had been limited to the telephone call and the other conversations that same night at the terminal as outlined by him in his earlier testimony.

The jury was thus faced with a clear conflict in testimony, resolution of which turned on the issue of credibility, a matter for decision by the jury. Evidently the jury accepted as true the testimony of Mr. Reinhofer and rejected the testimony of the four defendants. *Masciale* v. *U. S.*, 1958, 356 U. S. 286, 288.

It is axiomatic that this Court must view the evidence and the inferences reasonably to be drawn from it in the light most favorable to the appellee. *Glasser* v. *U. S.*, 1942, 315 U. S. 60, 80. So viewed, the evidence clearly indicates a situation in which the defendants were merely afforded an opportunity for wrongdoing which they seized of their own free will. *U. S.* v. *Carter*, 7 Cir., 1963, 326 F. 2d 351, 353; *U. S.* v. *Stocker*, 7 Cir., 1960, 273 F. 2d 754, 756, cert. den. 362 U. S. 963.

The record before us does not support a conclusion that otherwise innocent persons were induced to violate the law by trickery, persuasion or fraud of any agents either of the government or of their own employer. *U. S.* v. *Millpax, Inc.*, 7 Cir., 1963, 313 F. 2d 152, 156-7, cert. den. 373 U. S. 903, rehrg. den. 313 U. S. 954; *Sorrells* v. *U. S.*, 1932, 287 U. S. 435, 451; *U. S.* v. *Georgiou*, 7 Cir., 1964, 333 F. 2d 440, 441-2, cert. den. 379 U. S. 901.

After defendant Green had been found guilty as charged in the indictment (which charged him with unlawful possession) the written Order of Judgment and Commitment incorrectly stated that he was convicted of "embezzling, stealing, taking and carrying away" chattels etc. as well as of "having in his possession stolen goods" etc.

Defendant Green contends that in sentencing him, the Court gave consideration to an additional crime of which he had not been convicted. He also contends that he was penalized for electing to be tried by jury.

The government argues that the reference to theft in the written judgment is clearly a clerical error and that the Trial Judge could not have been misled. We do not believe that we can make that assumption on the state of the present record, although we would be inclined to agree that clerical error is a likely explanation.

We do believe, as the government does, that the phrase "we went through a jury trial here" which has been lifted out of its context by defendant Green does not reflect any reproach to the defendants by the Trial Judge

for having chosen to be tried by jury, but, on the contrary, refers to the Judge's opportunities for observing the defendants and his remarks on a lack of evidence of remorse or contrition at the time of the hearing.

Because of the discrepancy in the written Judgment, the Judgment and sentence as to defendant Green only is hereby vacated and this cause is remanded to the District Court solely for the purpose of resentence of defendant Green. In all other respects, the judgment of the District Court is affirmed.

AFFIRMED IN PART. JUDGMENT IN PART VACATED AND CAUSE REMANDED SOLELY FOR RESENTENCE OF DEFENDANT GREEN.

APPENDIX "B"

(Order of Court of Appeals dated July 20, 1967)

It is hereby ordered by the court, that the Petition for a Rehearing of this cause, filed by defendants-appellants, James E. Buckley, Robert D. Walker and Hugh Norwood, Jr. be and the same is hereby denied.

APPENDIX "C"

Section 659, Title 18, U. S. Code, in pertinent part, is as follows:

> Whoever embezzles, steals, or unlawfully takes, carries away or . . . obtains from any . . . motor truck or other vehicle . . . with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express;
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> Shall in each case be fined not more than $5,000 or imprisoned not more than 10 years, or both; but if the amount or value of such . . . goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 507

JAMES E. BUCKLEY, ROBERT D. WALKER, AND HUGH NORWOOD, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. "A") is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1967. A petition for rehearing was denied on July 20, 1967. The petition for a writ of cer-

tiorari was filed on August 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were entrapped as a matter of law.

2. Whether television sets stolen by petitioners were being transported in interstate commerce at the time of the theft.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, Eastern Division, petitioners were convicted of the theft of three television sets which were moving in interstate commerce, in violation of 18 U.S.C. 659. On June 16, 1966, each was sentenced to imprisonment for one year.[1] The court of appeals affirmed.

Each of the petitioners admitted at the trial that he had stolen a television set which was subsequently found in the trunk of his car by F.B.I. agents (Tr. 6, 203, 218, 224-226, 237-238).[2] The sole defense was entrapment (Tr. 6).

The evidence at the trial showed that Associated Truck Lines, Inc. (hereinafter "Associated"), report-

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[1] A co-defendant, Wesley K. Green, was convicted of possession of stolen chattels taken from interstate commerce in violation of the same statute. This sentence was vacated by the court of appeals and his case remanded to the district court for resentencing. He did not join in this petition.

[2] References are to the transcript ("Tr.") of trial in two volumes which we are lodging with the Clerk of the Court.

ed to the F.B.I. that it had been suffering from a "lot" of thefts. Petitioners, who were employed by Associated to perform general maintenance work on road trailers and who had no duties which required them to handle or move freight, were among those suspected of involvement. The F.B.I. undertook a surveillance of the premises (Tr. 11, 151-153, 168-170).

On December 9, 1965, three television sets which had been picked up by Associated from Sears Roebuck and Co. in Chicago for shipment to Michigan were located in a trailer parked in the yard of Associated's premises (Tr. 14-15, 37-38, 121-124, 127-128, 134-136). That evening, George Reinhofer, an employee of Associated, after receiving a telephone call from the terminal manager, called petitioner Buckley to tell him that there was some freight on a trailer. Buckley said "he would look at it and take care of it" (Tr. 264-265). When Reinhofer arrived at work at 11:00 p.m. that night, Buckley told him that there were three television sets and some Hi-Fi's in the trailer and that he (Buckley) "already had one" (Tr. 265-266, 270, 283). At approximately 12:30 a.m. Reinhofer moved the trailer to a different location in the yard pursuant to a request by petitioner Norwood who said "it was kind of hard to get at that place in the yard, that he didn't want anybody to see him" (Tr. 269-270).

The surveilling F.B.I. agent observed the three petitioners moving various cars around in the yard and transferring cartons into them from service trucks which they were driving (Tr. 59-63). At about

10:45 p.m., prior to Reinhofer's arrival at work, petitioner Buckley removed a carton from one of the service trucks and placed it in the trunk of his car (Tr. 265, 280, 288). Each of the petitioners was arrested while he was driving home from work that morning and a stolen television set was found in the trunk of the car driven by each of them (Tr. 80-81, 88-92, 98-101).

The petitioners testified to a series of approaches allegedly made to them individually by George Reinhofer in which he urged them, despite their refusals, to participate in thefts from Associated. They testified that on the night of the theft he urged them to take the television sets, telling them that if they did not dispose of the sets another employee would get into trouble (Tr. 197-201, 219-221, 231-236). In rebuttal Reinhofer categorically denied any such approaches to petitioners (Tr. 270-272, 278-279).

ARGUMENT

1. On the facts set forth in the Statement, it is clear that there was no entrapment as a matter of law, and that the issue was at most one for the jury which could properly resolve the disputed issues of fact against petitioner.

This Court has held that "[e]ntrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law enforcement officials * * *. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Sherman* v. *United States*, 356 U.S. 369, 372.

See also *Sorrells* v. *United States*, 287 U.S. 435, 441-442; *Masciale* v. *United States*, 356 U.S. 386, 388; *Lopez* v. *United States*, 373 U.S. 427, 435-436.

Petitioners base their defense of entrapment on alleged activities of fellow employees of Associated.[3] These activities, however, "merely afford[ed] opportunities or facilities for the commission of the offense." *Sorrels* v. *United States*, 287 U.S. 435, 441. The only evidence adduced by petitioners that shows inducement or persuasion was their own testimony that Reinhofer had allegedly approached them on prior occasions and urged them to engage in these thefts. Reinhofer, however categorically denied these allegations. In these circumstances the jury was entitled to disbelieve petitioners' testimony. See *Masciale* v. *United States*, 356 U.S. 385, 388.

2. Petitioners also argue that the stolen television sets were not moving in interstate commerce at the time of the theft since they had been placed on a city trailer by Associated. In view of the fact that the three television sets had been consigned to Associated by Sears Roebuck and Co. in Chicago for shipment to Michigan, this contention fails. The interstate transportation of the television sets began the moment Associated picked them up for interstate delivery. See *Wolk* v. *United States*, 94 F. 2d 310, 311-312 (C.A.

[3] The only activity of the F.B.I. agents in the instant case was to conduct a surveillance. There is no evidence that the F.B.I. agents even arranged for the television sets to be placed in the truck from which they were stolen by petitioners. Certainly no governmental activities can be characterized as inducement or persuasion.

8), certiorari denied, 303 U.S. 658, and it is well settled that goods moving in interstate commerce remain part of such commerce until they are delivered to the consignee. *Murphy* v. *United States*, 133 F. 2d 622, 626 (C.A. 6); *United States* v. *Schwartz*, 150 F. 2d 627, 628 (C.A. 2); *Marifian* v. *United States*, 82 F. 2d 628, 630 (C.A. 8), certiorari denied, 298 U.S. 686.[4]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1967.

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[4] Petitioners' reliance on *O'Kelley* v. *United States*, 116 F. 2d 966 (C.A. 8) is misplaced. In that case, convictions for conspiracy to steal part of an interstate shipment of sugar from a railroad car were reversed on the ground that the sugar was no longer part of an interstate shipment because it had been *delivered* to the consignee. See *Chapman* v. *United States*, 151 F. 2d 740, 741 (C.A. 8), and *Winer* v. *United States*, 228 F. 2d 944, 947-948 (C.A. 6), certiorari denied, 351 U.S. 906, pointing out this distinction.

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